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September 10, 2002

Dr. Jeffrey Runge
Administrator
National Highway Traffic Safety Administration
400 7th Street, SW
Washington, DC 20059

RE: Petition for Rulemaking

Dear Dr. Runge:

We are hereby submitting a petition for rulemaking pursuant to 49 CFR § 552.

We find ourselves in the unfortunate position of having to petition the NHTSA for rulemaking because of circumstances that led the Office of Vehicle Safety Compliance (OVSC) to close an investigation despite finding an apparent noncompliance with the Designated Seating Position (DSP) rule. We are asking that the agency reevaluate the definition of Designated Seating Position and modify the language of the requirement such a manner that it can and *will* be readily enforced by the agency.

In April 2001, Strategic Safety presented findings to NHTSA's Office of Vehicle Safety Compliance (OVSC) that the 2-door Ford Explorer appeared to be in violation of FMVSS 208, which requires seat belts in each designated seating position [Tab 1]. The rear seat of the Explorer 2-door is equipped with only outboard position belts. No restraint is provided for the middle position. Materials presented to OVSC included previous interpretations and FARS data that found there were 11 crashes involving the 2-door Explorer in which there were three passengers in the rear seat. Rear middle position occupants accounted for six fatalities. Further, the seat in the subject vehicle is a flat bench-style, split fold, with no protrusions or impediments that preclude a third occupant from comfortably occupying the middle position, the vehicle is not identified in the owner manual or marketing material as a four-passenger vehicle, at least one major auto enthusiast magazine identified the 2-door as a five-passenger vehicle, and a market research survey of 100 owners found that 50% acknowledged carrying three rear seat passengers. The 2-door Explorer has a rear seat

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hip room measurement of 41.5 inches because of the wheel well housing intrusion, but measures a full 52 inches just forward of the seat back [**See Tab 1**].

49 CFR §571.3 defines a designated seating position as:

[a]ny plan view location capable of accommodating a person at least as large as a fifth percentile adult female, if the overall seat configuration and design and vehicle design is such that the position is likely to be used as a seating position while the vehicle is in motion, except for auxiliary seating accommodations such as temporary or folding jump seats. Any bench or split-bench seat in a passenger car, truck or multipurpose passenger with a GVWR less than 10,000 pounds, having greater than 50 inches of hip room (measured in accordance with SAE J1100 (a)) shall have not less than three designated seating positions, unless the seat design or vehicle design is such that the center position cannot be used for seating.

OVSC personnel found the evidence compelling and in June 2001 opened a compliance investigation into the matter (PE-208-010326). However, in an April 30, 2002 letter to Ford regarding its investigation into Explorer 2-door noncompliance with the DSP (which was publicly released at the end of July), NHTSA OVSC, in an apparent reversal of prior reasoning and positions, concluded

Our data analysis indicates, and complaints to your company about the absence of a third seat belt assembly affirm, that the seat is likely to be used by three persons although only two seat belts are provided. Nevertheless, we have decided to close this investigation because it is doubtful that a noncompliance decision would result. We urge your company to make every effort to alert current and future owners of these vehicles that the seat capacity is two. [**Tab 2**]

The agency's letter to Ford is a clear acknowledgement of noncompliance, yet its unwillingness to take action sends a conflicting message. Furthermore, because the agency withheld its analysis as well as conclusions and recommendations (pursuant to U.S.C 552(b)(5)), we are left to surmise that the agency adopted Ford's position that the "likely to be used" clause, is not stated in objective terms as required by NHTSA statute and would not withstand a legal challenge [**Tab 3**]. We disagree with Ford's position, and apparently NHTSA's, and are therefore compelled to petition the agency to initiate rulemaking to clarify any alleged lack of objectivity may exist in the definition of DSP that prevents compliance enforcement.

In order to understand the current situation, we strongly urge NHTSA to examine the context and history of the DSP requirement. This history shows that NHTSA was in fact very concerned about potential seating positions lacking restraint systems. As a result, much was done to clarify the requirements and to prevent manufacturers from taking advantage of loopholes, with the understanding that there is no more important safety device than a seat belt restraint--and this restraint should be available in any seating position that is likely to be used.

The definition of a DSP evolved commencing in the late 1970s when NHTSA decided to amend its meaning. The debate began when NHTSA noticed that vehicles with adequate room for three occupants were being classified as having only two DSPs and sold with only two seat belts. The agency also noted an inconsistency between models, i.e., some models were sold with three belts, while others with similar measurements were being sold with only two. As a result, the agency requested information from manufacturers regarding these inconsistencies and the criteria they used to determine the number of DSPs.

In a May 22, 1978 notice (43 FR 21893) NHTSA published a "Notification to Vehicle Manufacturers" regarding their position on DSP [Tab 4]. The agency expressed its concern that vehicles were being sold with improperly designated seating capacities. Specifically, the agency noted that vehicles were being sold with only two front DSPs and thus only two seat belts, yet the seats could obviously seat three adults and middle position occupants were left without restraints. In this notice, the agency warned that while manufacturers were allowed to designate the number of seating positions the agency was going to begin determining the manufacturers' intent based, at least in part, on the vehicle design.

NHTSA proposed rulemaking on September 28, 1978 (43 FR 44556) to clarify its meaning of DSP [Tab 5]. NHTSA's intent was (1) to ensure that an adequate number of seat belts were provided, (2) to get the manufacturers to provide greater level of consistency in the seating capacity designations of their vehicles, and (3) to assure consumers that comparable vehicle sizes were similarly fitted. The agency noted that its investigation of the criteria used by manufacturers to designate seating positions revealed that their decisions were often based on marketing the vehicle rather than how the vehicle would be used. NHTSA went on to note that manufacturers' whose vehicles had sufficient room to accommodate three adults argued that their use of seat trim and the lack of seat padding in middle position show that they did not intend the position to be used. However, the agency disagreed and stated that this logic did not take into account *real-world* use and that they would assume that the position was intended to be used simply based on sufficient room and no rigid obstruction to prevent the use of the middle position. The agency proposal in this notice removed the reference to the manufacturers'

intent and specified dimensions. NHTSA proposed that a DSP means any position capable of accommodating a 5th percentile adult female, and that any seat in a vehicle that has hip room of 50 inches or greater was required to have three DSPs. *[NOTE: The hip room to accommodate three 5th percentile females is 38.4 inches.]*

In an April 19, 1979 notice (Docket 79-11 / 12; 44 FR 23229), NHTSA issued a final rule in response to manufacturers' comments and amended the definition of DSP [Tab 6]. Again, the intent of the agency was to clarify that

[e]very center seating position that is likely to be used should be equipped with a restraint system regardless of the overall statistical rate of use of center positions, since every potential occupant should be afforded protection in the event of a vehicle crash.

The agency went on to say that

[T]he use rate of center-seat positions will be affected by the future designs of vehicles. Therefore, the clarified definition of "designated seating position" will ensure that future designs do not encourage center-seat use unless occupant crash protection is afforded those positions.

The agency was asked whether vehicles with hip room measuring less than 50 inches were unconditionally allowed to designate two seating positions. NHTSA answered

[T]he notice proposing the amendment stated that the 50-inch specification does not mean that some vehicle seats with less than 50 inches of hip space should not also have more than two designated seating positions, if the vehicle and seat design is such that three positions would likely be used. It was pointed out that the specification is merely the amount of space the agency will consider as conclusive evidence that there should be at least three designated seating positions. These statements are not intended to imply that the agency would require seating position designations for each space capable of accommodating a 5th percentile female if the overall vehicle design and seat configuration is such that three positions would not likely be used.

Also, in response to Ford and other commenters, NHTSA noted that if obstructions or other designs precluded the use of the center position, the center position does not need to be a DSP and would not require a seat belt. The agency added a particularly poignant caveat in this notice that stated "the past failure of the NHTSA to adequately enforce standards dependent on the definition of "designated seating position" does not preclude

clarification of how that definition will affect enforcement of those standards in the future."

DSP was also addressed at the NHTSA Government/Industry meeting on August 15, 1979 [Tab 7]. Much of what was discussed in the above notices was reiterated in this meeting. Again, the intent of the DSP requirement is that if manufacturers want to designate only two seating positions, they need to make it clear in their design. The agency stated the public needed to know that positions that do not contain belts are not safe and it's the responsibility of the industry to make this clear.

NHTSA has reiterated its position again in a number of interpretation letters over the years. One of the most recent interpretations was in response to an inquiry from Western Star Trucks [Tab 8]. In this March 4, 1996 letter, the agency stated

We also note that the amount that is conclusive evidence of three positions is greater than 38.4 inches (the amount of hip room of three 5th percentile females).

In other words, if a manufacturer designates two seating positions for the rear seat and the hip room is greater than 38.4 inches, the seat must be clearly designed for only two occupants.

An earlier interpretation in response to a July 3, 1979, request from Nissan [Tab 9] asked NHTSA to confirm

[t]hat any bench or split bench seat with less than 50 inches of hip room may never be required to have three or more than three designated seating positions, notwithstanding the capability of accommodating a person at least as large as fifth percentile adult female.

NHTSA responded that Nissan's assumption was *incorrect* and went on to state that the requirement does *not* mean that vehicles with less than 50 inches of hip room should have less than three seating positions "if the vehicle and seat design is such that three positions would likely be used." Nissan also asked the agency how it would interpret the SAE standard that is used for measuring hip room and whether certain components would be considered "trimmed surfaces." Nissan was attempting to determine whether arm rests, seat back contours, or raised portions of the seat cushion would be considered trim and thus excluded from the measurement because the measurement specifies that the dimension be taken "between trimmed surfaces." NHTSA noted that "strictly speaking" these components would indeed be considered "trimmed surfaces." However, if the agency strictly followed the wording of the SAE procedure, only a portion of the driver's side seat would be included in the measurement—to which the agency stated would be

"an absurd result." NHTSA went on to handle this by stating that if a seat has distinct sections, then those sections would be measured separately and the dimensions totaled to determine hip room. NHTSA also said

[R]egarding these questions about the measurement procedure, I must make several candid remarks. The agency will not allow manufacturers to avoid the obvious intent of the definition of "designated seating position" by finding loopholes in the measurement procedure. Further, as noted above, even if the hip room as measured in accordance with SAE J11009(a) is less than 50 inches, a manufacturer may still be required to designate three seating positions. . . . Determinations of designated seating capacity under the amended definition should not cause manufacturers any real problems. If a manufacturer truly intends to market a particular bench or split-bench seat for two occupants, he can and should make this obvious by the seat design, regardless of whether the total seat dimension is more than 50 inches or less than 50 inches. One simple way to do this is to install a permanent arm rest or console in the center portion of the seat.

NHTSA provided an interpretation on the issue of DSP for Toyota in a February 1980 letter [Tab 10]. Toyota stated that strict adherence to the measurement procedure yielded rear seat hip room of 39.4 to 42.6 inches in several of its models. The manner in which these dimensions were obtained excluded the measurement of components that intruded into the seat bottom several inches (i.e., the edges of the seat back and contoured side padding). However, if the seat were measured from the center, all of these seats would exceed 50 inches of hip room. NHTSA took the same position with Toyota as it did with Nissan. The agency stated that it would not allow manufacturers to avoid the intent of the standard by finding loopholes. NHTSA also indicated that the designs Toyota presented "invited" occupants to use the center position because there was at least 10 to 12 inches of padded hip room between the two outboard seat belt assemblies. Further, NHTSA stated that there was no "sincere attempt" to indicate that the middle positions were not intended for use and "if the manufacturer does not in fact wish to market the vehicles as having three-passenger rear seats, we do not understand why, well padded center positions are present."

NHTSA cited the above interpretation in an April 9, 1980 response to Renault. Renault stated that its vehicle (LeCar) has a rear seat hip room measurement of 48.2 inches [Tab 11]. NHTSA reiterated its position on adherence to the "strict" measurement procedure. Renault also pointed out the close proximity of the two inboard portions of the rear belt assemblies, to which NHTSA responded that it

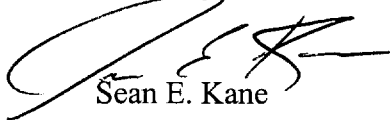
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[w]ould give more credence to this factor if the inboard portions of the belt assemblies were on stiff, immovable cables (or similar design). With the current design, a person wishing to sit in the center position can easily move the belts out of the way, so the belts are not real impediments to use of the center position.

In summary, the definition of DSP, and what is expected of manufacturers, is well described and well reasoned in the previous rulemaking and subsequent interpretations. However, because the agency has apparently now determined that the requirement is not enforceable as evidenced in PE-208-010326, and in lieu of a reevaluation of the agency's noncompliance investigation, minimally, NHTSA should devise rules that it is willing to enforce. Again, there is no more important safety device than a seat belt and occupants who will use a vehicle should be afforded the opportunity to buckle up. Seat belt use has always been a priority for NHTSA and the public has a right to depend on the agency's vigorous defense enforcement of all regulations related to these safety devices. Furthermore, the agency should consider the implications of the DSP and the effect on child restraints.

Please do not hesitate to contact us should you require any additional information.

Sincerely,



Sean E. Kane